

Canada Industrial Relations Board



Conseil canadien des relations industrielles

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Reasons for decision

Teamsters, Local Union 847,

complainant,

and

Canadian Merchant Service Guild,

respondent.

Board File: 28601-C

Neutral Citation: 2011 CIRB 605

September 23, 2011

A panel of the Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. John Bowman and David P. Olsen, Members.

Counsel of Record

Ms. Lisa Triano, for Teamsters, Local Union 847;

Ms. Kimberley H.W. Turner, Q.C., for the Canadian Merchant Service Guild.

These reasons for decision were written by Mr. John Bowman, Member.

I—Introduction

[1] On February 22, 2011, Teamsters, Local Union 847 (the Teamsters or the complainant) filed a complaint with the Board alleging that the Canadian Merchant Service Guild (the Guild or the

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respondent), breached sections 95(f), 95(g), 95(i) and 96 of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*) when it commenced internal union charges against three of its members arising from their participation in an unsuccessful campaign by the complainant to displace the Guild as the bargaining agent for a group of employees employed by Upper Lakes Shipping Limited (ULS or the employer).

[2] The Teamsters allege that the charges amount to reprisals against the three individuals, all of whom were rank-and-file members of the respondent, in retaliation for exercising their rights under the *Code* to change their exclusive bargaining agent.

II-Background

[3] In September 2010, the Teamsters filed an application with the Board to displace the Guild as the bargaining agent for a group of employees in the shipping industry. The application was filed in a timely manner and had sufficient support from the employees to cause the Board to order a representation vote. Prior to the application for certification being filed, the Guild advised one of its members, Mr. Grant Ostemaier, that he was being charged internally. Mr. Ostemaier was a member of the bargaining unit who had been campaigning on behalf of the Teamsters. In early November 2010, the Teamsters filed an unfair labour practice complaint with the Board alleging that the Guild had breached various sections of the *Code* in its response to the applicant's organizing campaign, including the charges against Mr. Ostemaier. The parties reached a settlement of the complaint. The settlement included an agreement that the charges against Mr. Ostemaier would be dropped. When the ballots were counted in the representation vote, the Guild was successful in retaining the certification.

[4] In late December 2010, Mr. Ostemaier and two other members of the respondent, Mr. Bill Kadwell and Mr. Donald McLeod, were given notice that the Guild had commenced internal charges against them. The charges were filed further to article 13.05 of the union's bylaws, which reads:

13.05 It shall be the duty of every Member to promote the interests and objects of the Guild. Without restraining the foregoing, it shall be considered contrary to this Code of Ethics for a Member:

(a) to do or permit to be done any act favouring or privileging any other labour body to the detriment of the Guild.

[5] Mr. Kadwell and Mr. McLeod were rank-and-file members of the Guild who had campaigned on behalf of the Teamsters during the period leading up to the representation vote. The Teamsters filed this complaint with the Board in response to the filing of the charges by the Guild. In March 2011, the Guild determined that the three members would be suspended from the union from March 14 to December 31, 2011. The members were given the option of paying a fine of \$1800.00 in lieu of the suspension. Two of the members paid the fine while the other, Mr. Kadwell, refused. All three members continued to work at their regular employment because the employer did not implement the suspensions. All three members continued to pursue internal union appeals regarding their suspensions. The result of these appeals was not known at the time of this decision, nor was any hearing scheduled on the appeals at the time this matter came before the Board.

[6] Given that the relevant facts were not in dispute, the Board gave the parties the opportunity to make further legal argument via video conference or through a further exchange of written submissions. The parties chose the latter option and the additional legal submissions were exchanged.

III—Positions of the Parties

A—Teamsters, Local Union 847

[7] The Teamsters submit that the charges filed against the three members of the Guild were clearly filed in response to the exercise of their rights under the *Code* to change unions, and are therefore a violation of sections 95(f), (g) and (i) and 96 of the *Code*. The Teamsters further submit that the section of the Guild's bylaws that has been used to justify such internal charges is itself illegal, and should be of no force and effect.

[8] The Teamsters submit that these charges were part of an overall campaign by the Guild to intimidate and coerce its members from expressing their true wishes during the representation vote process in November 2010. It submits that these activities prevented the employees from expressing their true wishes in that vote, and make it impossible for any new vote to fairly reflect the wishes of the employees. As a remedy for the alleged breaches of the *Code* the Teamsters request:

- a finding that the Guild violated the sections of the *Code* cited;
- an order that the internal bylaw of the Guild relied on to file the charges is unlawful and of no force and effect;
- an order that the charges be withdrawn and any penalties rescinded;
- an order that a notice be posted in the workplace advising employees of the Board's decision;
- an order that the Guild mail a copy of the Board's decision to its members;
- an order certifying the Teamsters for the bargaining unit, or in the alternative, an order that a representation vote be held;
- and an order that the Guild pay costs to the Teamsters.

B—Canadian Merchant Service Guild

[9] The Guild submits that the complaint should be dismissed since the charges against the three members were a lawful exercise of its right to protect the integrity of its bargaining unit. The union is entitled to take disciplinary action against members who support a raid against it as long as such action bears a fair and reasonable relationship to the accusations against the member. The Guild further submits that the complaint under sections 95(f) and (g) is premature as the members who were charged have exercised their right to appeal the penalties against them and that process has not been concluded. The Guild also submits that the Teamsters are not authorized to represent the three employees named in the complaint, and that these employees can file such complaints on their own behalf.

[10] The Guild further submits that some of the remedies sought by the Teamsters, such as the request to certify them for the bargaining unit, are beyond the jurisdiction of the Board. The Guild submits that the Teamsters already had the opportunity to achieve certification through the

representation vote which it lost, and that it is trying to achieve certification through the "back door" by making this application.

IV—Analysis and Decision

[11] Section 16.1 of the *Code* provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed the submissions from the parties, the Board is satisfied that the documentation before it sufficient for it to decide this matter without a hearing.

[12] The Teamsters allege that the Guild breached sections 95(f), (g) and (i) and section 96 of the *Code*. Those sections are set out below:

95. No trade union or person acting on behalf of a trade union shall

...

(f) expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by applying to the employee in a discriminatory manner the membership rules of the trade union;

(g) take disciplinary action against or impose any form of penalty on an employee by applying to that employee in a discriminatory manner the standards of discipline of the trade union;

...

(i) discriminate against a person with respect to employment, a term or condition of employment or membership in a trade union, or intimidate or coerce a person or impose a financial or other penalty on a person, because that person

(i) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

(ii) has made or is about to make a disclosure that the person may be required to make in a proceeding under this Part, or

(iii) has made an application or filed a complaint under this Part.

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union.

[13] The parties have provided the Board with the relevant jurisprudence concerning the Board's interpretation of section 95 of the *Code*, which was previously section 185. In the case of *Frank Nowotniak and Gordon E. Ostby et al.* (1979), 34 di 835; and [1979] 2 Can LRBR 466

(CLRB no. 194), the Board was faced with an allegation that a union had discriminated against certain members who had tried to displace it as the bargaining agent. This case specifically interpreted what is now section 95(i)(i) of the *Code*. In that case, the union amended its bylaws and refused to reinstate certain employees into membership. The Board stated:

It is our conclusion the motivation for enacting Article 7(4) was to use it to stop all or some of the dissidents, and particularly Ostby and Nowotniak, from being reinstated in the union because of making the application for certification with the Board and testifying and participating in those proceedings. This is contrary to section 185(i) of the Code [now section 95(i)].

(pages 849; and 477)

[14] In *James Carbin* (1984), 59 di 109; and 85 CLLC 16,013 (CLRB no. 492), the Board dismissed a complaint that the union had breached section 185 of the *Code* when it expelled an employee from membership in the union for supporting a rival union in a representation campaign. In that case, the Board noted that the member's employment was not threatened due to the expulsion; that he was treated in the same manner as other members who were also expelled for supporting another union and that the Board should therefore not intervene in an internal union matter.

[15] During the 1990's the Board heard a number of cases involving internal union discipline that arose from an ongoing representation campaign between the Canadian Union of Postal Workers (CUPW) and the Letter Carriers Union of Canada (LCUC). In *Paul Horsley et al.* (1991), 84 di 201; and 15 CLRBR (2d) 141 (CLRB no. 861), the Board found that the union had breached section 95(g) of the *Code* when it expelled some employees from union membership for supporting another union during a raiding campaign. The following paragraphs summarize the Board's view regarding why such conduct was a breach of the *Code* and are instructive for the purposes of this case:

What is troublesome about this whole matter is CUPW's insistence that the complainants give up their membership in the LCUC which is undoubtedly the trade union of their choice. This of course instantly smacks of infringement on the fundamental freedom of association of the complainants contained in section 8 of the *Code* which we referred to earlier. The basic right of individuals to belong to the trade union of their choice and to participate in its lawful activities has been described by the Board in the past as being the cornerstone upon which the *Code* is founded. This fundamental freedom is sacrosanct and it cannot be infringed upon by employers, trade unions, or by any person. This panel of the Board does, however, concur with the rationale expressed by the Board in *James Carbin*, *supra*; therefore, we have

approached these complaints extremely aware of the need to attempt to strike a balance between the individual rights of the complainants and the rights of CUPW to manage its own affairs and to protect itself in a raid situation.

We fully understand that it is CUPW memberships that have been taken away from the complainants, not LCUC memberships and the question may be asked how this infringes upon the basic rights of the complainants. What has to be kept in mind here is that under the Code employees do have the right to attempt to change their bargaining agent from time to time or to revoke the bargaining rights of the incumbent bargaining agent and to revert to non-union status if this is what the majority of the employees in a bargaining unit desire. There are specific open periods provided for in the scheme of the Code to accommodate these activities by employees and it goes without saying that these activities are a lawful exercise of the fundamental freedoms enshrined in the Code and are protected as such. If the complainants have been disciplined and penalized for refusing to give up their basic freedom, this in itself is surely contrary to section 95(g) of the Code, particularly if CUPW has sought to achieve an unlawful goal by applying the standards of discipline of the union to the complainants in a discriminatory manner.

(pages 208; and 147-148)

[16] In *Nathalie Beaudet-Fortin* (1997), 105 di 98; 40 CLRBR (2d) 161; and 98 CLLC 220-029 (CLRB no. 1216), the Board found that the union had breached sections 95(f) and (g) of the *Code* when it expelled the complainant from membership in the union because she had supported another union during an unsuccessful raid. In reaching this conclusion, the Board stated:

We have no doubt, the union, in acting in this manner, was seeking to protect its institutional interests. Its decision was intended to punish the complainant for acting in a manner that, in its view, was contrary to its interests when she exercised her right to change the bargaining agent in accordance with the Code. In the circumstances, exclusive union representation places certain limits on a certified union that intends to react to the stance of some of its members during a raid. While it is true that participation in raiding activities may constitute a threat and undermine the bargaining agent's integrity, the *Code* nevertheless provides that both bargaining unit employees and union members have the right, at specific times, to try to change bargaining agents and to encourage other employees to change bargaining agents so as to call the certified agent's status into question. This is why employees may not, **for this reason alone**, be absolutely stripped of the right to remain members of the certified bargaining agent if the raiding campaign fails.

In this case, however, the union's decision to expel the complainant indefinitely deprived Ms. Beaudet-Fortin absolutely of the right to exercise her free choice to remain a member of the certified bargaining unit, CUPW, following the raiding campaign and to participate in its activities and, consequently, deprived her of the right to deal with her exclusive representative with respect to the determination of her conditions of employment in the same way as the other bargaining unit employees who joined the union for this purpose. ...

(emphasis in original; pages 117-118; 182-183; and 143,234)

[17] The Board in *Nathalie Beaudet-Fortin, supra*, refers to the case of *James Carbin, supra*, and does not follow its line of reasoning. The Board found that the decision in *James Carbin, supra*, took too narrow of an approach by placing considerable emphasis on the fact that the complainant in that case did not lose his job as a result of the union discipline and by not giving due consideration to the fact that the complainant was deprived of his freedom of association when he was expelled from the union. To the extent that the decisions of the Board in *Nathalie Beaudet-Fortin, supra* and *James Carbin, supra* differ in their approach to section 95 of the *Code*, the Board finds that the *Nathalie Beaudet-Fortin* decision is preferable because it clearly gives members of a union protection from reprisal for exercising their lawful right to change unions. This is more consistent with the intent of section 95 and particularly section 95(i) of the *Code*.

[18] One other aspect of the case law that should be noted is that the response of a union regarding internal discipline during a raid situation may be different where the member in question holds a position in the union. For example, it was noted in *Horsley et al., supra* (pages 208; and 147–148), that the complainants had been removed from their positions as shop stewards in the union prior to their expulsion. The Board found nothing wrong with this action seeing it as an internal union matter that dealt with a potential conflict of interest situation.

[19] The Board notes that the Guild has raised an issue concerning the timeliness of the complaints under sections 95(f) and (g) of the *Code*. Sections 97(4) and 97(5) of the *Code* are relevant to this argument. Those sections read as follows:

97.(4) Subject to subsection (5), no complaint shall be made to the Board under subsection (1) on the ground that a trade union or any person acting on behalf of a trade union has failed to comply with paragraph 95(f) or (g) unless

(a) the complainant has presented a grievance or appeal in accordance with any procedure that has been established by the trade union and to which the complainant has been given ready access;

(b) the trade union

(i) has dealt with the grievance or appeal of the complainant in a manner unsatisfactory to the complainant, or

(ii) has not, within six months after the date on which the complainant first presented their grievance or appeal pursuant to paragraph (a), dealt with the grievance or appeal; and

(c) the complaint is made to the Board not later than ninety days after the first day on which the complainant could, in accordance with paragraphs (a) and (b), make the complaint.

(5) The Board may, on application to it by a complainant, determine a complaint in respect of an alleged failure by a trade union to comply with paragraph 95(f) or (g) that has not been presented as a grievance or appeal to the trade union, if the Board is satisfied that

(a) the action or circumstance giving rise to the complaint is such that the complaint should be dealt with without delay; or

(b) the trade union has not given the complainant ready access to a grievance or appeal procedure.

[20] Section 97(4) of the *Code* states that a complaint under sections 95(f) and (g) cannot be filed until the complainants have exhausted their internal union appeal rights. In this case, the complainants had filed an appeal of their suspensions, but the appeal had not been heard at the time the complaint was filed. Section 97(5) of the *Code* gives the Board the ability to determine a complaint even if the appeal process has not been exhausted.

[21] In the circumstances of this case, the Board has decided to issue a decision on this matter without waiting for the result of any internal union appeal. One of the factors considered in reaching this decision is that the Guild did not provide any information to the Board indicating when the appeal would be heard. Consequently, there was no evidence before the Board that the appeals would be dealt with in a timely manner. The Board finds that this matter should be decided without delay and therefore has decided to issue its decision immediately pursuant to section 97(5) of the *Code*. It should also be noted that the time limit argument does not apply to the allegation that the Guild breached section 95(i)(i) of the *Code*.

[22] In their initial response to the complaint, the Guild reserved the right to argue that the Teamsters did not have standing to bring this complaint on behalf of the three individuals. In a subsequent submission to the Board, the issue of the Teamsters' right to represent the three employees was raised again, however, the objection was not pursued in any detail. The Board frequently receives unfair labour practice complaints from unions regarding alleged unlawful employer activity directed against specific employees who were union supporters. The Board does not, as a matter of course, require the applicant union to provide statements confirming that they represent each employee named in the complaint. In this case, there is no dispute that the three complainants actively

supported the applicant union; indeed that is the reason they were internally disciplined in the first place. The Board therefore dismisses the objection of the Guild and finds that the Teamsters have standing to represent the three employees named in the complaint.

[23] Applying the law to the facts of this case, which are not disputed, it is clear that the three employees were charged internally and disciplined for exercising their fundamental right under the *Code* to change unions. None of the three members held a position within the Guild. It was undisputed that the three members supported the Teamsters and campaigned on their behalf during the period leading up to the representation vote. The three individuals had a fundamental right to participate in a proceeding under the *Code*, in this case a raid (displacement) application. The Guild cannot penalize them for exercising their rights of association under section 8 of the *Code*. Clearly, the charges were a form of reprisal against the three individuals for their activities on behalf of the applicant. The Board finds that the charges are a clear violation of section 95(i)(i) of the *Code*. Given this finding, there is no need for the Board to determine whether the Guild breached sections 95(f) or 95(g), or section 96 of the *Code*.

[24] In fashioning a remedy for the breaches of section 95 of the *Code*, the Board agrees with the respondent that the remedy requested by the applicant is overly broad. The complainant has not provided evidence that the representation vote previously ordered by the Board did not reflect the true wishes of the employees. Likewise, the complainant has not convinced the Board that it should depart from its normal practice and order the respondent to pay its costs in bringing this application. The Board also declines to make any finding regarding the legality of the respondent's internal bylaw 13.05, which was invoked as the basis for the charges against the three employees. The Board has found that the manner in which the union applied that section of its bylaws was a breach of the *Code*. It is not necessary for the Board to go beyond this and involve itself any further in the internal workings of the union.

[25] The Board orders the following remedies:

- (i) all penalties issued to the three employees as a result of the internal union charges are to be immediately rescinded and any fines paid by the employees to the respondent union are to be immediately refunded;
- (ii) the respondent union is ordered to mail a copy of the Board's decision to all employees in its bargaining unit within 30 days of the date of this decision. The respondent is to confirm to the Board in writing that these remedies have been implemented.

[26] This is a unanimous decision of the Board.

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

David Olsen
Member